EXAMS AND MEDICAL OPINIONS:

WATERS, WALKER, AND TL 14-01

Trainee Handout

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Objectives

Upon completion of the lesson, the attendee will be able to:

* Understand the need of VA examinations
* Describe criteria warranting an examination
* Identify evidence that can substitute a medical opinion
* Discuss changes in TL 14-01

References

The following references will be use to discuss the lesson. All of the references can be found by first accessing the Compensation services website:

* *Waters v. Shinseki*, April 6, 2010
* *McLendon v Nicholson*, June 5, 2006
* 38 § CFR 3.159
* December 2013 VSCM Bulletin
* TL 14-01
* *Walker v Shinseki*, February 21, 2013
* 38 § CFR 3.303(a)
* 38 § CFR 3.303(b)
* 38 § CFR 3.309(a)
* April 2014 VSCM Bulletin

Topic 1: THE NEED OF MEDICAL EXAMINATIONS

**What is the Point?**

Very seldom do we receive a claim were the Veteran submits a claim with a tabbed binder that says, “This is how the injury occurred in service (with highlighted copies of his STRs showing the in-service injury), this is medical evidence of continued treatment for symptoms, oh and here is a current and completed DBQ by my private examiner. Please rate my case!” That rarely ever happens.

Recognizing that rarity of such, legislation has provided us with 38 CFR 3.159(4)., which basically states that medical examinations (an opinions) are needed when certain criteria are met (which will soon be explained) but the medical evidence of record is not sufficient competent medical evidence to decide or efficiently evaluate the claim.

Remember competent evidence is about more than just a diagnosed illness, but must also include the clinical and diagnostic findings that help the rating specialist identify the disabilities severity.

With that said, let’s just right in. To Waters v Shinseki.

Topic 2: OVERDEVELOPMENT AND MEDICAL EXAMINATIONS

**Waters v. Shinseki**

Waters V. Shinseki: Can anyone tell me the basis for the Waters case? The question in the appeal was whether the Department of Veterans Affairs justifiably refused to give the appellant George Waters a medical examination to aid in determining whether his medical disability during military service had a causal relationship to the different medical disabilities he suffered after his service. While serving on active duty, the veteran was diagnosed with paranoid schizophrenia, which existed prior to enlistment but was aggravated during service. In May 1972, the veteran received a medical discharge for schizophrenia, and in December 1972, VA granted service connection for schizophrenia. The veteran filed disability compensation claims, alleging that his diabetes mellitus and hypertension were related to in-service administration of antipsychotic drugs for schizophrenia and that his depression was secondary to diabetes. The regional office denied the claims, finding insufficient evidence between schizophrenia and hypertension or diabetes. The regional office also found that his service records did not indicate that he served in Vietnam or that he was exposed to herbicides during service. Since service connection for diabetes was not warranted, the RO denied service connection for depression as secondary to diabetes. The Board affirmed the decision, concluding that there was “no competent medical evidence or record showing a nexus between the veteran’s military service” and disabilities. The Veterans Court held that the veteran had not made a sufficient showing to entitle him to a medical examination. The Veterans Court stated that the Board had correctly noted that lay assertions of medical status do not constitute medical evidence sufficient to require an examination.

The veteran argued before the Federal Circuit that he was entitled to a physical examination and that the Board and Veterans Court misinterpreted the governing statute and applied an incorrect and prejudicial evidentiary standard in denying his claim. The Federal Circuit rejected the veteran’s assertion that his conclusory generalized statement that his service illness caused his present medical problems was enough to entitle him to an examination. Since all veterans could make such a statement, this theory would eliminate the carefully drafted statutory standards governing the provision of medical examinations and require the Secretary to provide such examinations as a matter of course in virtually every veteran’s disability case.

Upon a review of the case, a ruling was provided in our favor that the Department of Veterans Affairs was justified in not providing Mr. Waters an examination. The question now stands “When is it necessary to order a VA examination?”

To further illustrate the decision… The Federal Circuit held that the Board used the stricter standard under 38 U.S.C. § 5103A(d)(2)(A) based on no “competent evidence of a nexus”, whereas the correct standard under section 5103A(d)(2)(B) only required the Board to state that the record did not *indicate* that the veteran’s current disabilities had a causal connection or were associated with active military service; which is associate with the 3rd prong we will discuss.

**38 § CFR 3.159 (a)(2)**

Upon a further review of 3.159, looking at paragraph 4 we find guidance on providing examinations….

In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim.

A medical examination or medical opinion is necessary if the information and evidence of record does not contain sufficient competent medical evidence to decide the claim,

If the evidence of record is complete, by all means do go ahead and rate the case. Many times when reviewing a file, the evidence lets you know that a grant is proper; however, you still don’t quite have enough information to rate it against the Rating Schedule. Example: A veteran files a claim for a left knee condition that he has been experiencing problems with since discharge from service. Per a review of the file, it is noted that he sought treatment on several occasions for the left knee. An additional review of the folders notes that his military occupational specialty (MOS) was that of a paratrooper. The veteran has submitted medical evidence of a diagnosed left knee condition from his private treating facility? What may be missing that keeps us from rating this claim right at that point? Most likely, the private medical record would be missing the range of motion for the knee which is a major portion needed to rate the knee. If that is the case, an examination would be needed to obtain that information to rate the case.

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| |  | | --- | |  | | Taking a further look at 38 CFR 3.159 (C)(4)(i) noted to be “*Providing medical examinations or obtaining medical opinions” .* Listed there are the 3 conditions for obtaining an examination or medical opinion*.*   * (A*) Contains competent lay or medical evidence of a current diagnosed disability or persistent or recurrent symptoms of disability*; * (This is the first prong and noted as the statement or the claim itself that we would receive from the Veteran.) * (B) *Establishes that the Veteran suffered an event, injury or disease in service, or has a disease or symptoms of a disease listed in §3.309, §3.313, §3.316, and §3.317 manifesting during an applicable presumptive period provided the claimant has the required service or triggering event to qualify for that presumption;* * (Once you have received the veteran’s statement or claim, then you would move to seeing if there was an event or incident in service related to his statement. This information would assist with determining if the 2nd prong is met) | |

* (C*) Indicates that the claimed disability or symptoms may* *be associated with the established event, injury, or disease in service or with another service-connected disability*

(Is there any indication within the statement that this condition been going on since service? If so, this would meet the requirement for the 3rd Prong)

An example of a statement that would fit all three prongs would be: While stationed at Fort Hood, I injured my back while playing basketball. I sought treatment for the incident while there and I have continued to have problems with my back since I discharged from the military…

**Threshold for Obtaining an Opinion**

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| The threshold for ordering an examination is and continues to be very low. Please note that the requirement for the 3rd prong is not really new. This information has been listed within the regulations; however, in the past we have not been enforcing it. In the past we were so focused on taking the claim (1st prong), then seeing if there was any incident or event in service (2nd prong) and then ordering the examination. We did not stop to see if there was any indication that the claimed condition was related to service.   * The requirement for an “indication of association” can be satisfied by lay testimony * The Veteran’s indication that his/her condition has existed “since service” satisfies the requirement   (Caution: do not get hung up on the actual phrase “**since service**”; this may be phrased in many formats but the phrase must indicate that the injury or claimed condition has been ongoing since discharge from service.)   * However, without a medical or lay indication of association, no examination would be warranted in *most* cases |

**McLendon v Nicholson, June 5, 2006**

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| As stated before, the 3rd prong is not new. As stated in McLendon v. Nicholson. Previously it wasn’t enforced but now we have to ensure that we are properly evaluating the claims as they are received to ensure that they meet the requirements for an examination. The threshold for an examination remains low.   * 3rd prong element requires a nexus between a current disability and an in-service injury, disease or event, is a low threshold. * Veteran’s credible testimony of continuation of pain since service is sufficient to satisfy the 3rd prong element |

**Review Exercise**

Now let’s run through some examples of that reflect the information we just discussed on Waters.

1: Two years after discharge, the Veteran claimed “back pain”. STRs show one complaint of a sore back after unloading a truck with no evidence of a back disability at separation. The Veteran’s claim provided no medical evidence of continuous symptoms and no statement that the current disability persisted since military service.

**Can this claim be denied without an examination?**

2: Two years after discharge, the Veteran claimed “back pain” and had only one complaint in STRs of a sore back after unloading a truck with no evidence of a back disability at separation. The Veteran’s claim provided no medical evidence of continuous symptoms, but includes a statement that “I hurt my back unloading a truck in service, and it has hurt ever since that time”.

**Is an examination necessary?**

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| 3: Two years after discharge, the Veteran claimed “right knee pain”. STRs show two treatments for right knee pain with no evidence of a right knee disability at separation. The Veteran’s claim provided no medical evidence of continuous symptoms and no statement that the current disability persisted since military service. A VA examination was conducted that revealed a diagnosis of right knee strain with opinion linking it to treatment in service. Service connection is granted.  **Is this correct?** |

4: Two years after discharge, the Veteran claimed “right knee pain”. STRs show two treatments for right knee pain with no evidence of a right knee disability at separation. The Veteran’s claim provided no medical evidence of continuous symptoms and no statement that the current disability persisted since military service. A VA examination was conducted, but it revealed no symptoms and no diagnosed disability. Service connection is denied.

**Is this correct?**

**Summary: Impact of Waters Court Case**

Remember to focus on the 3-prong process for determining when an examination is warranted. You may also want to have a copy of Training Letter 14-01 handy for quick review.

* Veteran’s claim or statement of back pain is acceptable as current persistent or recurrent symptoms of disability (this meets the 1st prong)
* STRs, DD 214, etc. showing an event, injury, or disease in service (items or information you may find in the file to substantiate that an event took place while in service related to the claim would assist with meeting the requirement for the 2nd prong)
* Veteran’s lay statement “since service” is adequate to indicate an association or causal connection with service (information that would communicate a causal relationship to service or that the incident has been going on since service would assist in meeting the 3rd prong)

Topic 3: OVERDEVELOPMENT AND MEDICAL OPINIONS

**Walker v.Shinseki**

While Waters v Shinseki deals with overdevelopment in the way of ordering unnecessary medical examinations, ninety percent of Walker v Shinseki deals with requirements of service-connection.

Then why are we talking about it in exam training. Well, 10% of this court case deals with overdevelopment in the way of ordering unneeded medical opinions.

We just discussed the three-prong requirement for warranting a medical examination. This same three-prong requirement applies to service-connection.

Before service-connection may be granted, the evidence of record must prove that an in-service injury/event occurred, a current diagnosis exists and that the two are related-you know, the nexus. Walker v Shinseki focus on what is or may substitute for a nexus.

**A Nexus for VA rating Purposes**

As we all know “nexus” is a simply a fancy word for causal link. If “a” proves that “b” caused “c”, then “a” is our nexus.

\* Our most common example of a nexus is the medical opinion. We’re all familiar with the language “Please opine if ‘x’ is at least as likely as not related to the in-service event ‘c’ on such-and-such date as found in the STRs?” Whenever the response to that question is positive then the medical opinion becomes the nexus. It links the current disability to the event or injury that occurred in service.

The problem is that too many unneeded medical opinions are being ordered when a sufficient nexus is already of record.

\* The nexus we most often forget about, but is equally as valid the medical opinion, is competent medical evidence that demonstrates continuous symptoms from the time of discharge until now -without stopping or with minimal interruptions. This kind of evidence is normally sufficient to serve as the nexus for the purpose of establishing service connection under 38 CFR § 3.303(a). This must be medical evidence showing treatment for or complaint of this symptom. Competent medical evidence must be provided by a physician or medical expert. Lay evidence is not competent medical evidence. A “history of” does not count as competent medical evidence. Again, competent medical evidence must be actual treatment evidence.

It is important to note that isolated instances do not meet this requirement. Let’s say in the example we just discussed the Veteran had been discharged 20 years ago and had provided evidence that in the last twenty years he had been treated only 4 times in twenty years for symptoms of meningitis. That would not constitute continuous symptoms and would not fulfil the nexus requirement for the purposes of service connection. However, it could fulfill Element C and qualify the Veteran for a medical examination with opinion.

If you unsure as to whether any symptom picture shown in the record is sufficient to constitute “evidence of continuous symptoms,” an examination with opinion should be scheduled if otherwise warranted by the evidence of record. Refer to 38 CFR § 3.159(c)(4)

An example of medical evidence of continuous symptoms: Two years after discharge, the Veteran claims “I contracted meningitis during a deployment and I still suffer from symptoms related to it.” Review of STRs find that the Veteran was first diagnosed in service and was treated a few times for meningitis before discharge. Meningitis was even listed at his time of separation. Now the Veteran submits medical evidence were he has been treated almost every three to four months for the past two years for known symptoms of meningitis to include insidious headache, fever, and neck stiffness. The medical evidence shows that the Veteran undergoes constant treatment with Amphotericin B (an intravenous medication for people with cryptoccol meningitis). While an examination might be warranted to examine the severity/activeness of the meningitis, a medical opinion would not be needed as the medical evidence of record shows continuous symptoms.

\* The last thing that may fulfill the nexus requirement is continuity of symptomatology of a chronic disability. The difference between continuous symptoms and continuity of symptomatology is that “continuous symptoms” must be proven with medical evidence while continuity of symptomatology of a chronic disability can be provided in a lay statement by the Veteran. More information can be found about continuity of symptomatology in 38 CFR § 3.303(b)

**What is Chronic?**

A list of chronic disabilities is enumerated in 38 CFR 3.309a. Remember that in order to meet the criteria of “chronic” that the disability must have been diagnosed or treated either during service or during the time period listed in 38 CFR 3.307. If a claimed disability or symptoms related to a disease is listed in 3.309a and was first treated in the service or during the appropriate presumptive period, and the Veteran now states suffering from known symptoms of the chronic disability, a medical opinion is not needed as the disability will be service connected unless the continuity of symptomology is **clearly** attributed to intercurrent causes per 3.309b. (intercurrent simply means that two disease are occurring at the same time)

***Other??***

If we were to look at 38 CFR 3.309, you would see specific disabilities like diabetes mellitus, leukemia, myelitis, and then you’d see something broad like “other organic diseases of the nervous system”. Policy Staff has decided that these listed disabilities here are consumed in the phrase “other organic diseases of the nervous system. Therefore, for example, if someone was never treated for headaches during service but receives a diagnosis of migraine headaches two months after service, migraine headaches, would in this instance be considered a chronic disability as it is listed in 3.309a and meets the presumptive time limit of 3.307(a)(3)

**Exercise**

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| If there are no questions, then we are about to do an exercise. There are three scenarios. You have to determine if a medical opinion is warranted. |
| 1. Six months after discharge, the Veteran claimed right knee strain. STRs and exit exam show diagnosis of right knee strain. The Veteran’s claim included medical evidence dated last week (within one year of discharge) showing symptoms right knee pain. **Is a medical opinion required? Why or why not?**  |  | | --- | | 1. Eighteen months after discharge, the Veteran claims “I was first diagnosed with asthma in service and I haven’t stopped suffering from it until this day. I have to use an inhaler once to twice a day.” STRs and separation exam show diagnosis of asthma that did *not* pre-exist service. There is no continuous medical evidence from date of discharge. However, there is a medical report dated last week showing current symptoms and a diagnosis of asthma. **Is a medical opinion required? Why or why not?** 2. Two years after discharge, the Veteran claimed hemorrhoids. STRs and separation exam show diagnosis of hemorrhoids that did not pre-exist service. The Veteran’s claim included medical evidence from date of discharge to date of claim showing ongoing treatment for symptoms of hemorrhoids. **Is a medical opinion required? Why or why not?** |   **Summary of Walkers**   |  | | --- | | As a reminder, we need three items to grant service-connection: in-service event/injury, a current diagnosis, and a confirmed link between the two.  Three items can satisfy the requirement for a nexus:   * A medical opinion: which is often over requested * Evidence of continuous symptoms as demonstrated when the medical evidence shows symptoms continuing without stopping or recurring regularly, with minimal interruptions, from service under 38 § CFR 3.303(a) * Chronicity/continuity rule under 38 CFR § 3.303(b) is limited to chronic diseases listed in § 3.309(a) |   TOPIC 4: TRAINING LETTER 14-01 AND EXAM RELATED INFORMATION |

**TL 14-01 Facts Pertaining to Exams**

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| Here are just random reminders as it pertain to examination and TL 14-01  \* Be sure to review 38 CFR 3.327(a) and 3.327(b)(2) before ordering routine examinations. Under 3.327(a), exams should not be ordered, if the medical evidence of record (CAPRI) confirms that the Veteran’s disability has not decreased in severity. 3.327b lists six instances when RFE should not be ordered…  (i) When the disability is established as static;  (ii) When medical evidence shows symptoms have persisted without material improvement for a period of 5 years or more;  (iii) Where the disability from disease is permanent in character and of such nature that there is no likelihood of improvement;  (iv) In cases of veterans over 55 years of age, except under unusual circumstances;  (v) When the rating is a prescribed scheduled minimum rating; or  (vi) Where a combined disability evaluation would not be affected if the future examination should result in reduced evaluation for one or more conditions.  \* DBQs should be accepted as adequate unless the exam lacks something necessary for rating purposes. A defect in the DBQ (for instance not being completed) does not automatically render it inadequate. A DBQ is only inadequate if the findings lack clarity, sufficient rationale or necessary clinical and diagnostic results. For instance, the examiner fails to comment on whether or not imaging studies were completed on a gastrointestinal DBQ for hepatitis C, there is no need to return the exam as insufficient as imaging studies would have no bearing on the evaluation assigned for this particular disability.  \* We no longer request general medical examinations as an automatic rule for claims for IU. Per TL 13-13, in most instances, we should only request the DBQs for the disability/ies that the Veteran alleges are the cause or are reasonably raised by the evidence of record to have caused unemployability. |

**Exam Request Builder**

As a reminder, the examination request builder exists as a tool. This best practice is found under rating job aids on the compensation service website (<http://vbaw.vba.va.gov/bl/21/rating/rat00.htm>).

LESSON REVIEW, ASSESSMENT AND WRAP-UP

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| You have completed the  Exams and Medical Opinions: Waters, Walker, and TL 14-01 lesson.  You should now be able to:   * Understand the need of VA examinations * Describe criteria warranting an examination * Identify evidence that can substitute a medical opinion * Discuss changes in TL 14-01   Remember that Exam Request Builder is a tool that is available to each RVSR, VSR, and DRO. The builder formats the language to be inserted into the exam request and includes all the necessary legal language. This tool has been embraced by Compensation Services as a best practice tool. |
| **Assessment**:  Please Remember to complete the on-line assessment in TMS to receive credit for completion of the course.  The assessment will allow you to demonstrate your understanding of the information presented in this lesson. |